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No. 96-1100

In The

Supreme Court of the United States

October Term, 1996

WARWICK MALL TRUST, et al.,

Petitioners,

v.

STATE OF RHODE ISLAND, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF RESPONDENT STATE OF RHODE ISLAND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to review a federal claim which was never raised in the state court below.

2. Whether this Court has jurisdiction to review a petition for certiorari filed more than 90 days after the Rhode Island Supreme Court's entry and docketing of a judgment or decree.

3. Whether a State court's requiring a plaintiff to prove the unconstitutionality of the State statute "beyond a reasonable doubt" constitutes a violation of a due process right to access to the courts.

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JURISDICTION

The Supreme Court of the United States lacks jurisdiction over the instant petition because: 1) petitioners failed to raise a federal question in the State court and cannot do so for the first time in a petition for writ of certiorari; 2) the petition for writ of certiorari was not timely filed; and 3) there is no federal claim presented by the State Court's application of a "beyond reasonable doubt" standard of proof to a party challenging the constitutionality of a state statute.

STATUTORY PROVISIONS INVOLVED

Title 28 U.S.C. § 1257(a):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Title 28 U.S.C. § 2101(c) requires:

> Any . . . writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days

after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

STATEMENT OF THE CASE

Plaintiff-petitioners' eight count complaint requested that the Rhode Island Superior Court for Providence County declare unconstitutional certain portions of Rhode Island Public Law 95-400. Defendants moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Rhode Island Rules of Civil Procedure. After considering extensive briefs and oral argument, the Superior Court determined that the plaintiffs had not sustained their burden of proving "beyond a reasonable doubt" that R.I. Pub. Law 95-400 was unconstitutional. The Superior Court therefore dismissed the complaint in its entirety.

Petitioners appealed to the Rhode Island Supreme Court, challenging the dismissal of only three of their claims. While petitioners vaguely asserted below that one portion of the challenged statute violated both a state and federal right, petitioners have not sought certiorari on this issue. None of the remaining arguments petitioners made to the Rhode Island Superior or Supreme Court addressed federal constitutional issues, rights or privileges.

On July 19, 1996, the Rhode Island Supreme Court issued an Order affirming the Superior Court's dismissal of the plaintiffs' complaint pursuant to Rule 12(b)(6). Pet.

Cert. App., p. A-1. That Order indicated that "An opinion setting forth the reasons for this order will follow." On October 11, 1996, the Rhode Island Supreme Court issued its opinion. Pet. Cert. App., p. A-4.

REASONS FOR DENYING THE WRIT

PETITIONERS HAVE FAILED TO MEET THE JURISDICTIONAL REQUIREMENTS FOR THIS COURT'S ACCEPTANCE OF A PETITION FOR WRIT OF CERTIORARI

Jurisdiction to review judgments or decrees rendered by the highest court of a state is vested in this Honorable Court pursuant to 28 U.S.C. § 1257. That law permits review by writ of certiorari: 1) where the validity of a statute or treaty of the United States is drawn into question; 2) where the validity of a State statute is challenged as violative of the United States constitution; or 3) where a right, privilege or immunity is specially set up or claimed under the Constitution or treaties of the United States. Petitioners attempt to bring their case within the ambit of provision 3. However, petitioners never raised a federal right, privilege or immunity in the State courts. Nor is their newly-created claim a substantial or meritorious federal issue. Finally, a petition for writ of certiorari based on the above provisions must be filed within ninety (90) days after the entry of any judgment or decree. 28 U.S.C. § 2101. Petitioners failed to do so.

A. PETITIONERS NEVER RAISED A FEDERAL QUESTION IN THE RHODE ISLAND STATE COURTS.

It is axiomatic that this Supreme Court has no jurisdiction to exercise its appellate power under 28 U.S.C. § 1257 unless a federal question has been raised and/or decided in the State court below. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317 (1983); *Hill v. California*, 401 U.S. 797, 805, 91 S.Ct. 1106 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940).

Petitioners attempt to present to this Court the question of "[w]hether a party challenging the constitutionality of an act of the General Assembly of Rhode Island may, consistent with the constitutional protections afforded litigants, be required to prove its claim 'beyond a reasonable doubt' upon a pretrial motion to dismiss the complaint for failure to state a claim." Petition, p. i. This issue does not set forth a federal claim.

Petitioners therefore argue that the State's implementation of this standard of proof somehow denies them access to the courts, in violation of their federal due process rights. However, petitioners never presented, raised, or asserted before the State trial court an alleged federal due process right. Neither did petitioners make any such assertions on appeal to the Rhode Island Supreme Court.[1]

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[1] Indeed, petitioners have failed to set forth in their petition for certiorari, in accordance with Rule 14.1(g) of this Court's

Petitioners' arguments to the Rhode Island Supreme Court asserted merely that requiring a party to prove a statute unconstitutional beyond a reasonable doubt is "unworkable and inequitable", and "erects barriers that few if any complaints challenging legislative enactments could ever overcome. . . . " Opening Brief for Plaintiffs-Appellants, No. 96-162, Supreme Court of Rhode Island (June 17, 1996), Appendix. Such arguments do not raise or even imply an alleged violation of a federal due process right to access to the courts. Consequently, neither the Superior nor Supreme Court of Rhode Island ever addressed whether the standard requiring a plaintiff to rebut a presumption of constitutionality beyond a reasonable doubt, deprived a plaintiff of any federal right, including an alleged due process right to access to the courts.

The proffered federal issue never having been raised in or addressed by the State court, it may not now be presented. This Court therefore lacks jurisdiction to entertain petitioners' application for writ of certiorari.

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rules, "specification . . . of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way on which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof . . . so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on the writ of certiorari.

B. A STATE'S IMPLEMENTATION OF A STANDARD OF PROOF DOES NOT RAISE A FEDERAL DUE PROCESS CLAIM

Petitioners' recently created argument is insubstantial and without merit. The standard of which petitioners complain – that a challenger must rebut the presumption of constitutionality of a statute "beyond a reasonable doubt" is applied by courts throughout the country. *See, e.g., Watkins v. New York State Ethics Commission*, 554 N.Y.S.2d 955, 147 Misc.2d 350 (N.Y.Supp. 1990); *Felts v. State*, 537 So. 2d 995, dec. approved 549 So.2d 1373 (Fla.App. 1 Dist. 1988); *State v. Kam*, 748 P.2d 372, 69 Haw. 483 (1988); *Application of Anderson*, 114 Ill. Dec. 705, 516 N.E.2d 860, 162 Ill.App.3d 815 (Ill.App. 2 Dist 1987). *Accord, 44 Liquormart, Inc., v. Rhode Island*, 116 U.S. 1495 (1996) (applying "beyond reasonable doubt" standard to challenge to Rhode Island statute).

This standard of proof has no relationship whatsoever to any alleged right to access to the courts. As petitioners recognize in their application for writ of certiorari, due process requires only an opportunity to be heard at a meaningful time and in a meaningful manner. Pet., pages 16-17. Requiring a party to prove a particular matter "beyond a reasonable doubt" does not deprive a party of a due process right to the courts, and petitioners have cited no case law which indicates otherwise.

With reference to this specific case, petitioners answered respondents' motion to dismiss by filing an opposing brief of forty-nine (49) pages. The Superior Court held hearings on two days. After concluding that a

motion to dismiss was appropriately applied to a constitutional challenge to a statute, the Superior Court rendered a lengthy oral decision dismissing the complaint. Petitioners then filed a ninety-four (94) page Opening Brief on appeal to the Rhode Island Supreme Court, followed by a nineteen-page reply brief. The Rhode Island Supreme Court "carefully considered . . . each of the . . . arguments raised by the plaintiffs in their appeal, and [found] them to be unpersuasive." Opinion of the Rhode Island Supreme Court, Pet.App. p A-21. Petitioners obtained and enjoyed full access to both the trial and appeal courts. They were simply unable to prove their claims.

Petitioners assert that the Rhode Island courts created an irrefutable presumption that no facts exist to support a claim seeking to enforce constitutional rights. Pet., p. 20. Such assertion is plainly incorrect. In considering petitioners' constitutional challenge, the lower court simply found that the facts petitioners attempted to proffer in order to rebut the presumption of constitutionality were irrelevant to the legal claims asserted. Pet.App., p. A-21.[2]. Thus, the State followed well-established precedent by dismissing petitioners' constitutional challenges as a matter of law. *Newport Auto Salvage, Inc. v. Town Council*, 502 A.2d 339 (R.I. 1985); *Chartier Real Estate Co. v. Chafee*, 101 R.I. 544, 565, 225, A.2d 766, 777-78 (1967) (motion to dismiss was properly granted where plaintiffs

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[2] The court ruled that "there were no material facts in dispute that were outcome determinative" because the facts petitioners attempted to introduce "would not matter . . . from a legal standpoint." Pet. App. A-21.

failed to carry their burden of establishing "beyond a reasonable doubt" that, as a matter of law, certain legislation was unconstitutional).

C. THE PETITION WAS NOT TIMELY FILED

In accordance with 28 U.S.C. § 2101(c), a petition for writ of certiorari intended to bring any judgment or decree in a civil action before the Supreme Court for review "shall be taken or applied for within ninety days after the entry of such *judgment* or *decree*." (emphasis added). The Rhode Island Supreme Court issued its judgment or decree in this matter pursuant to its Order of July 19, 1996. The petition for certiorari was not filed until January 9, 1997 – far in excess of ninety days after the Rhode Island Supreme Court entered judgment against petitioners.

Petitioners appear to have calculated their ninety day period from the date of the Rhode Island court's October 11, 1996 opinion. However, this Court's rules specifically require that a petition for certiorari be filed within ninety (90) days of issuance of a "judgment or decree", not from the issuance of an opinion. 28 U.S.C. § 2101; United States Supreme Court Rule 13.

CONCLUSION

For the reasons stated above, the petition for certiorari is improper and should be denied.

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January 24, 1997

APPENDIX

APPEDIX

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

SUPREME COURT

No. 96-162 APPEAL

WARWICK MALL TRUST, BLISS PROPERTIES, INC.,
and IRVING SCHWARTZ,

Appellants,

v.

THE STATE OF RHODE ISLAND, THE HONORABLE LINCOLN
C. ALMOND, in his capacities as Governor of the State
of Rhode Island and Chairman of the Rhode Island
Economic Development Corporation, and Providence
Place Group,

Appellees.

On appeal from the
Superior Court for Providence County,
Case No. PC 95-4960

OPENING BRIEF FOR PLAINTIFFS-APPELLANTS
WARWICK MALL TRUST,
BLISS PROPERTIES, INC., AND IRVING SCHWARTZ

* * *

QUESTIONS PRESENTED

1. Whether P.L. 95-400's provisions regarding the City of Providence's tax treaty are valid, despite that statute's lack of approval by the voters of Providence in the referendum required by R.I. Const. Article XIII, § 4?

2. Whether P.L. 95-400's provisions requiring future payments of sales tax revenues to the Providence Place Mall's developers' lenders are valid, despite P.L. 95-400's lack of approval by the voters of Rhode Island in the referendum required by R.I. Const. Article VI, § 16, in view of plaintiffs' proffered evidence that Governor Almond told the Board of the Economic Development Corporation that a failure by a future General Assembly to appropriate such funds would ruin the State's credit rating?

3. Whether P.L. 95-400's provisions vesting tax-exempting power in unelected political appointees are repugnant to the separation of powers doctrine?

4. Whether the challenged statute's predictive legislative "findings," the majority of which do not pertain to currently-existing factual circumstances, are entitled to great deference by the judiciary amounting to preclusive and conclusive effect?

5. Whether a party challenging the Constitutionality of a statute has the burden, at the pleading stage, to establish the un-Constitutionality of the challenged statute "beyond a reasonable doubt," which is a standard significantly more rigorous than the usual Rule 12(b)(6) standard?

* * *

V. THE SUPERIOR COURT ERRED IN GRANTING DEFENDANTS' RULE 12(b)(6) MOTION AND BY HOLDING THAT PLAINTIFFS HAD THE BURDEN, AT THE PLEADING STAGE, TO ESTABLISH THE UNCONSTITUTIONALITY OF THE CHALLENGED STATUTE "BEYOND A REASONABLE DOUBT," WHICH IS A STANDARD SIGNIFICANTLY MORE RIGOROUS THAN THE USUAL RULE 12(b)(6) STANDARD.

The trial court erred in failing to apply the usual Rule 12(b)(6) standard. The legal standard to be applied in passing upon a motion to dismiss is whether plaintiff would have a legal right to relief under any set of facts that fit within the compass of the complaint, and in this regard the well-pled allegations of the complaint must be accepted as true. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Furthermore, the court must draw all reasonable inferences in favor of the non-movant. *Allen v. West Point-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). A motion to dismiss can be granted only when it appears *beyond doubt* from an examination of the complaint that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

The trial court stood this standard on its head. The trial court erroneously imposed a "beyond a reasonable doubt" standard upon *plaintiffs*. In doing so, the Superior Court alluded to language from [*sic*] the Rhode Island Supreme Court's opinion in *Chartier Realty Company, Inc.* v. Chaffee [*sic*], 101 R.I. 544 (1967), which the Superior

Court took to suggest that the legal standard to be applied in this case was whether plaintiffs' complaint standing alone, had established the un-Constitutionality of the challenged statute "beyond a reasonable doubt." [App. Tab 4, pp. 12-18]. The "beyond a reasonable doubt" standard applies to factual matters, and usually in a criminal case. A motion to dismiss tests only the legal sufficiency of a complaint, and cannot establish contested facts. In dismissing plaintiffs' claims involving the referendum-on-debt requirement and the non-delegation doctrine, the Superior Court essentially resolved all possible factual disputes against plaintiffs and in favor of the challenged legislation.

The Superior Court's ruling erects a barrier that few if any complaints challenging legislative enactments could ever overcome, especially when plaintiff's theory is that a facially-neutral statute is discriminatory in effect or as applied.

A perfect example of why the Superior Court's allocation of burdens is unworkable and inequitable is found in the Rhode Island liquor-price advertising ban case, *44 Liquormart, Inc. v. Rhode Island*, 1996 WL 241709 (May 13, 1996):

> The parties stipulated that the price advertising ban is vigorously enforced, that Rhode Island permits "all advertising of alcoholic beverages excepting references to price outside the licensed premises," and that petitioners' proposed ads do not concern an illegal activity and presumably would not be false or misleading. *44 Liquor Mart, Inc. v. Racine*, 829 F.Supp. 543, 545 (D.R.I. 1993). *The parties disagreed, however, about*

> *the impact of the ban on promotion of temperance in Rhode Island. On that question the District Court heard conflicting expert testimony and reviewed a number of studies.*

44 Liquormart, Inc. v. Rhode Island, 1996 WL 241709, *5. The United States Supreme Court's opinion makes clear that fact-finding, not the use of blunderbuss presumptions, is required:

> However, without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance.

Id., 1996 WL 241709, *12. This is a classic question of fact that cannot be resolved by reading the pleadings. There is an exact parallel here to appellants' claim regarding the obligation EDC will undertake to the Providence Place Mall's lenders being a State debt. However, the Superior Court disregarded plaintiffs' proffered evidence, and decided the case on an improper presumption.

If the Superior Court's application of the law is correct in this case, the United States Supreme Court's application of the law in *44 Liquormart* was error. Applying the Superior Court's reasoning to the *44 Liquormart* case results in a decision that plaintiffs there had failed at the pleading stage to demonstrate beyond a reasonable doubt that Rhode Island's price advertising ban was un-Constitutional, because their case depended on disputed facts that must be resolved in favor of the challenged enactment.

If it is upheld, the Superior Court's application of *Chartier* will have an immediate chilling effect across a broad spectrum of rights.

* * *